

ORIGINAL

Federal Communications Commission

FCC MAIL SECTION 97-94

Before the
Federal Communications Commission
Washington, D.C. 20554

MAR 20 10 17 AM '97

DISPATCH

In the Matter of)
)
Amendment of Rules and) CS Docket No. 97-98
Policies Governing Pole)
Attachments)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 14, 1997

Released: March 14, 1997

Comment Date: May 12, 1997

Reply Comment Date: June 12, 1997

By the Commission:

TABLE OF CONTENTS

	Page Nos.
I. INTRODUCTION	2
II. BACKGROUND	3
III. POLE ATTACHMENT ISSUES	5
A. Development of the Formula	5
B. Southwestern Bell Petition	8
C. Notice of Proposed Rulemaking	10
1. Potential Adjustments to the Pole Attachment Formula	10
2. Other Proposed Formula Adjustments	15
a. Administrative Component	16
b. Maintenance Component	17
c. Taxes Component	17
3. Rate of Return	18
IV. CONDUIT ATTACHMENT ISSUES	18
A. Application of the Pole Attachment Formula to Conduits	18
B. Proposed Conduit Methodology	20
V. OTHER MATTERS	22

VI. REGULATORY FLEXIBILITY	22
VII. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS	33
VIII. PROCEDURAL PROVISIONS	33
IX. ORDERING CLAUSES	34
APPENDIX A - CURRENT FORMULA (NOTING PROPOSED CHANGES)	36
APPENDIX B - MAPPING PROPOSED FROM PART 31 TO PART 32	37
APPENDIX C - PROPOSED CONDUIT ATTACHMENT FORMULA	38

I. INTRODUCTION

1. This Notice of Proposed Rulemaking seeks comment on proposed modifications to the Commission's rules relating to the maximum just and reasonable rates utilities may charge for attachments made to a pole, duct, conduit or right-of-way. These attachments are referred to as "pole attachments."¹ We believe that a re-evaluation of this formula may be necessary to improve accuracy in the continued application of these rules to cable television systems and to telecommunications carriers pursuant to the Telecommunications Act of 1996 ("1996 Act").² We also propose amending the formula so that it reflects our current accounting rules that apply to telephone companies. Finally, in this Notice, we propose a conduit³ methodology that will determine the maximum just and reasonable rates utilities may charge cable systems and telecommunications carriers for their use of conduit systems. The proposed formula would apply to all telecommunications carriers pending the effectiveness of the new formula required by the 1996 Act.⁴

¹ See 47 U.S.C. § 224(a)(4).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 104 Stat. 56, 149-151, signed February 8, 1996 (to be codified at 47 U.S.C. § 224).

³ According to the FCC ARMIS Operating Data Report, FCC Report 43-08 (January 1992), a conduit is a pipe placed in the ground through which cables are pulled.

⁴ 47 U.S.C. § 224(e)(1) *as added by* the 1996 Act, § 7. In a separate proceeding, within the two-year period specified in Section 224(e), we will adopt a separate conduit formula for telecommunication carriers. Thereafter, the conduit formula we propose in this Notice will only be applicable to cable systems who solely provide cable services.

II. BACKGROUND

2. It has become common practice for cable systems and telecommunications carriers to lease space from utilities on poles or in ducts, conduits, or rights-of-way, in order to provide cable service or telecommunications services. The federal government did not regulate these arrangements until 1978, when Congress, in response to concerns raised by cable television operators, enacted Section 224.⁵ In Section 224(d)(1), Congress established the parameters of just and reasonable cable pole attachment rates that

assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way.⁶

The zone of reasonableness is bounded on the lower end by the utility's incremental costs, and on the upper end by the cable system or telecommunications carrier's share of the utility's fully allocated costs of owning and maintaining the poles to which an attachment has been made. Incremental costs are those costs that the utility would not have incurred "but for" these attachments.⁷ Congress expected that pole attachment rates based on incremental costs would be low, because utilities generally recover the make-ready or change-out charges directly from cable systems.⁸ Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that are associated with the space occupied by pole attachments.⁹ Congress acknowledged that there might be some difficulty in determining certain components of a utility's operating expenses and actual capital costs.

3. Section 224(b)(1) grants the Commission authority to regulate the rates, terms, and conditions governing pole attachments and requires that such rates, terms and conditions are just and reasonable.¹⁰ The Commission is also authorized to adopt procedures necessary to hear and

⁵ 47 U.S.C. § 224.

⁶ 47 U.S.C. § 224(d)(1).

⁷ S. Rep. No. 95-580, 95th Cong., 1st Sess. 19 (1977)(1977 Senate Report).

⁸ *Id.*

⁹ *Id.* at 19-20.

¹⁰ The Commission's authority under Section 224(c)(1) does not extend to pole attachment rates, terms, and conditions that a state regulates. 47 U.S.C. § 224(c)(1). Jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments. Reversion to the Commission, with respect to individual matters, also occurs if the state does not take

to resolve complaints concerning such rates, terms, and conditions.¹¹

4. When Congress enacted Section 224 in 1978, it directed the Commission to institute an expeditious program for determining just and reasonable pole attachment rates. The intent was that the program would necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation.¹² Congress did not believe, however, that special accounting measures or studies would be necessary because most cost and expense items attributable to utility pole plant were already established and reported to various regulatory bodies. Congress also did not expect the Commission to re-examine the reasonableness of the cost methodologies that various regulatory agencies had sanctioned. It recognized that the Commission would have to "make its best estimate" of some of the less readily identifiable costs.¹³

5. Section 703(6) of the 1996 Act amended Section 224(d)(3). This amendment expanded the scope of Section 224 by applying the pole attachment rate formula to telecommunications carriers in addition to cable systems.¹⁴ As amended, the statute defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."¹⁵ The statute also defines "utility" as any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and that owns or controls poles, ducts, conduits, or rights-of-ways used, in whole or in part, for any wire communications.¹⁶ The term "utility" does not include any railroad, any cooperatives or any federally or state-owned entity.¹⁷ The formula proposed in this Notice will apply to attachments on poles, within ducts, conduit or rights-of-way by both cable systems and telecommunications carriers until a separate methodology is proposed for

final action on a complaint within 180 days after its filing with the state, or within the applicable period prescribed for such final action in the state's rules, as long as that prescribed period does not extend more than 360 days beyond the complaint's filing. 47 U.S.C. § 224(c)(3).

¹¹ 47 U.S.C. § 224(b)(1).

¹² 1977 Senate Report at 21.

¹³ *Id.* at 20.

¹⁴ 47 U.S.C. § 224(a)(4), as amended by 1996 Act § 703.

¹⁵ 47 U.S.C. § 224(a)(4), as amended by 1996 Act § 703.

¹⁶ 47 U.S.C. § 224(a)(1), as amended by 1996 Act § 703. But note that for the purposes of this section, Section 224(a)(5) excludes incumbent local exchange carriers as defined in Section 251(h).

¹⁷ *Id.*

telecommunications carriers.¹⁸ Congress directed the Commission to issue a new pole attachment formula relating to telecommunications carriers within two years of the effective date of the 1996 Act, to become effective five years after enactment.¹⁹ We will propose these new rules and seek comment in a subsequent Notice.

III. POLE ATTACHMENT ISSUES

A. Development of the Pole Attachment Formula

6. In 1978, the Commission adopted procedural rules governing pole attachments.²⁰ Subsequent Commission orders have refined the Commission's methodology for determining the amount of usable space on a pole and the space occupied by cable systems.²¹ These orders have also required additional information to be included with pole attachment complaints, and improved complaint procedures.²²

7. In *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144,²³ the Commission sought comment regarding the amount of usable space for various size poles in different service areas.²⁴ The total usable space is the space on the utility pole above the minimum grade level that is usable for the attachment of wires, cables, and related

¹⁸ See 47 U.S.C. § 224(d)(3), but only to the extent that such carrier is not a party to a pole attachment agreement.

¹⁹ 47 U.S.C. § 224(e)(1), as added by 1996 Act § 703.

²⁰ *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, 68 FCC 2d 1585 (1978) (First Report and Order). See also *Second Report and Order*, 72 FCC 2d 59 (1979); *Third Report and Order*, 77 FCC 2d 187 (1980) (*Third Report and Order*), *aff'd Monongahela Power Co. v. FCC*, 655 F. 2d 1254 (D.C. Cir. 1985) (per curiam); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, 2 FCC Rcd 4387 (1987) (*Pole Attachment Order*), recon., 4 FCC Rcd 468 (1989).

²¹ *Second Report and Order*, 72 FCC 2d at 59-79; *Petition to Adopt Rules Concerning Usable Space on Utility Poles*, *Memorandum Opinion and Order*, RM 4556, FCC 84-325, slip op. at para. 10 (released July 25, 1984) (*Usable Space Order*). See also *Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985). Alabama Power challenged the Commission's methodology for net pole investment and for carrying charges. The court upheld the challenge, vacated the Commission's rules and remanded to the Commission. As a result the Commission revised its rules as in the Pole Attachment Order.

²² *Id.*

²³ *First Report and Order*, 68 FCC 2d 1585 (1978).

²⁴ *Second Report and Order*, 72 FCC 2d at 68.

equipment.²⁵ The Commission's determinations were based upon the outcome of survey results, consideration for the National Electric Safety Code ("NESC"), and practical engineering standards used in the construction of utility poles. The Commission found that "the most commonly used poles are 35 and 40 feet high, with usable spaces of 11 to 16 feet, respectively."²⁶ The Commission recognized the NESC guideline that 18 feet of the pole space must be reserved for ground clearance²⁷ and that six feet of pole space is for setting the depth of the pole.²⁸ To avoid a pole by pole rate calculation, the Commission adopted rebuttable presumptions of an average pole height of 37.5 feet, an average amount of usable space of 13.5 feet, and an average amount of 24 feet of unusable space on a pole. In addition, the Commission created a rebuttable presumption of one foot as the amount of space a cable television attachment occupies.²⁹

8. The Commission initially adopted a formula to determine the maximum allowable pole attachment rate under Section 224 on the basis of a utility's fully allocated cost of owning a pole.³⁰ This formula has been further refined through orders in complaint cases³¹ which have resulted in the following generally applicable formula for calculating the maximum rate.³²

$$\text{Maximum Rate} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

9. The first component of the formula, space occupied by attachment divided by the total usable space on a pole, is used to calculate the percentage of usable space that the attachment occupies on an average pole. The Commission's rules define usable space as the space on a utility pole above the minimum grade level that can be used for the attachment of wires, cables and associated equipment.³³ For purposes of cable television system attachments, the Commission's *Petition to Adopt Rules Concerning Usable Space on Utility Poles* permanently

²⁵ 47 C.F.R. § 1.1402(c).

²⁶ *Id.* at 69

²⁷ *Second Report and Order*, 72 FCC 2d at 68 n.21.

²⁸ *Id.*

²⁹ *Second Report and Order*, 72 FCC 2d at 69-70.

³⁰ *Second Report and Order*, 72 FCC 2d at 59-79.

³¹ See, e.g., *Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia*, PA 79-0029, 79 FCC 2d 232 (1980); *Continental Cablevision of New Hampshire, Inc. v. Concord Electric Co.*, Mimeo No. 5536 (Com. Car. Bur., July 3, 1985).

³² 47 C.F.R. § 1.1404.

³³ See 47 C.F.R. 1.1402(c).

assigned one foot of usable space per pole to cable systems.³⁴ The denominator of the first component is set using a rebuttable presumption that the total usable space per pole is 13.5 feet.³⁵ Therefore, one cable attachment presumptively occupies 7.4% of an average pole.

10. The second component of the overall formula is the net cost of a bare pole. The component is derived from the gross investment in poles less accumulated depreciation and accumulated deferred income taxes. An adjustment is made to a utility's net pole investment to eliminate the investment in crossarms and other non-pole related items. To accomplish this, the Commission determined to reduce net pole investment by 15% for electric utilities and 5% for telephone companies. Thus, to arrive at the net cost of a bare pole, a factor, 0.85 for electric utilities or 0.95 for telephone companies,³⁶ is multiplied by the net investment per pole, as shown in the following formula:

$$\text{Net Cost of a Bare Pole}^{37} = \frac{\text{Factor X Net Pole Investment}}{\text{Number of Poles}}$$

We believe these are the appropriate factors for arriving at the net cost of bare pole.

11. The final component of the overall pole attachment formula is the carrying charge rate. Carrying charges are the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments. The carrying charges include the utility's administrative, maintenance, and depreciation expenses, a return on investment, and taxes. To help calculate the carrying charge rate, we developed a formula that relate each of these components to the utility's net investment.³⁸ The entire formula is attached to this Notice as Appendix A.

³⁴ *Usable Space Order*, slip op. at para. 10.

³⁵ 47 C.F.R. § 1.1404(g)(11); *Second Report and Order*, 72 FCC 2d at 69. See also *Third Report and Order*, 77 FCC 2d at 192.

³⁶ The two factors reflect the differences between telephone companies' and electric utilities' investment in crossarms and other non-pole investment that is recorded in the pole accounts. Electric utilities typically have more investment in crossarms than telephone companies. The 0.85 factor for electric utilities recognizes this difference. See *Pole Attachment Order*, 2 FCC Rcd at 4390.

³⁷ See *Pole Attachment Order*, 2 FCC Rcd at 4402, Appendix A. This formula rearranges the *Pole Attachment Order's* net cost of a bare pole formula for presentation purposes. Net pole investment is defined as the gross investment in poles less accumulated depreciation and accumulated deferred income taxes with respect to pole investment.

³⁸ *Pole Attachment Order*, 2 FCC Rcd at 4402-03, Appendix A. We discuss the carrying charge rate formula below.

B. Southwestern Bell Petition

12. On August 26, 1994, Southwestern Bell Telephone Company ("SWB") filed a Petition for Clarification, or in the Alternative, a Waiver of our formula for computing maximum reasonable pole attachment rates.³⁹ SWB argues that in Oklahoma, the Commission's pole attachment formula produces a negative net cost of a bare pole and other negative figures, resulting in negative rates.⁴⁰ SWB asserts that these abnormal results arise as the original costs of the poles are depreciated over time, particularly since the cost of removing the pole at the end of its useful life is included in the original cost of the pole. Because the cost of removal can be high, SWB argues it has resulted in negative net pole investment for its poles in Oklahoma.⁴¹ SWB proposes to remedy the rate problem by extracting the cost of removing poles from the formula for calculating the accumulated depreciation used to determine pole attachment rates.⁴² This would increase the net pole investment SWB would use in applying the formula, thereby making SWB's pole attachment rates positive under that formula.

13. Supporting SWB's petition, U S West Communications, Inc. ("U S West") states that under the current pole attachment formula, the potential for negative net pole investment exists.⁴³ U S West agrees that this can occur because of the high cost of pole removal and the high accumulated depreciation balances for pole investment.⁴⁴ U S West supports SWB's proposal that we adjust the pole attachment formula by extracting the cost of removing poles from accumulated depreciation.⁴⁵

14. The Texas Cable TV Association, the Arkansas Cable Television Association, the Kansas Cable Television Association, the Missouri Cable Telecommunications Association, and the Cable Systems of Oklahoma, Inc. (collectively, "Cable Associations") filed joint comments opposing SWB's petition.⁴⁶ The Cable Associations claim that SWB's proposal does not comport

³⁹ Southwestern Bell Telephone Company, Computation of Rates for Attachment of Cable Television Hardware to Utility Poles, Petition for Clarification or in the Alternative, a Waiver, AAD 94-125 (filed Aug. 26, 1994)(*SWB Petition*).

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 2.

⁴² *Id.* at 3.

⁴³ US West Comments at 2.

⁴⁴ *Id.*

⁴⁵ *Id.* at 4.

⁴⁶ On December 16, 1994, the Cable Associations filed a complaint against SWB that raised the negative net salvage value issue. The Cable Associations present data that indicate that the maximum just and reasonable pole attachment rates that SWB could charge the cable systems in Oklahoma and Kansas under our formula were negative.

with the Commission's pole attachment formula and would result in unlawful pole attachment rates.⁴⁷ The Cable Associations also argue that, because SWB's accumulated depreciation exceeds its investment in poles, it has, in effect, created a regulatory asset on which it has been earning a return.⁴⁸ The Cable Associations maintain that we should not allow carriers to extract the cost of removing poles from accumulated depreciation.⁴⁹

15. Discussion. Negative net pole investment may result from the way we have historically calculated depreciation rates. We generally prescribe depreciation rates at levels sufficient to give each carrier an opportunity to recover its plant investment on a straight-line basis over the life of the associated plant. The rate also includes a provision that allows each carrier to accrue over the life of the asset, the expenses associated with the removal and disposition of the plant investment, including the cost of removal. Depreciation rates have been calculated by using the following formula:

$$\text{Depreciation Rate} = \frac{100\% - \text{Accumulated Depreciation \%} - \text{Net Salvage \%}}{\text{Average Remaining Life}}$$

The depreciation rate determined by this formula is applied to the gross plant value. In the formula, accumulated depreciation is the portion of the plant that has been charged to expense in previous periods and is often referred to as the depreciation reserve. Net salvage is the estimated difference between the amount the carrier would receive as salvage for sale of retired plant and the plant's estimated cost of removal. Average remaining life is the estimated future life expectancy of investment in a particular plant account.

16. As accumulated depreciation increases for plant with high removal costs, the application of the depreciation rate formula may lead to net pole investment becoming negative.⁵⁰ This would mean that accumulated depreciation could exceed the asset's original cost.⁵¹ SWB

The parties have settled this complaint without prejudice to any action we may take in response to SWB's petition. See *Texas Cable TV Association et al. v. Southwestern Bell Telephone Company*, Order, 10 FCC Rcd 8184 (Com. Car. Bur., July 28, 1995).

⁴⁷ Cable Associations Comments at 2.

⁴⁸ *Id.*

⁴⁹ *Id.* Under Part 32 Uniform System of Accounts, accumulated depreciation accounts for telephone companies includes the total depreciation taken on plant in service. Since the depreciation rates factor in the salvage values of plant less the cost of removal, the account effectively includes an accrual for the cost of removal.

⁵⁰ In those instances where net salvage is negative, i.e. when cost of removal exceeds salvage value.

⁵¹ To illustrate this, we assume the following:

Accumulated Depreciation	0%
Estimated Salvage Proceeds	10%

asserts that its poles in Oklahoma are an example of plant where this has occurred. SWB contends that the cost of removal for its pole investment exceeds the salvage value for poles resulting in a negative net salvage value. In these cases, the total depreciation taken over the life of the pole may exceed the pole investment and the net pole investment may therefore become negative over time. Because our pole attachment formula applies percentages for the carrying charge factors to the poles' net investment, a negative net salvage value could result in negative or unusually low pole attachment rates.⁵²

C. Notice of Proposed Rulemaking

1. Potential Adjustment to the Pole Attachment Formula

17. As detailed below, we seek comment on the issues raised by SWB's petition. We also seek comment on aspects of the current formula which some parties believe require modification. A group of electrical utilities recently filed a Whitepaper ("Whitepaper") in anticipation of this Notice.⁵³

18. The Whitepaper suggests that an increase in the current presumptive pole height is appropriate. The Whitepaper asserts that over time, and with increased demand, the average

Estimated Cost of Removal	50%
Average Remaining Life	10 years

These assumptions would result in a depreciation rate of 14 percent per year:

$$\text{Depreciation Rate} = \frac{100\% - \text{Accumulated Depreciation \%} - \text{Future Net Salvage \%}}{\text{Average Remaining Life}}$$

$$\text{Depreciation Rate} = \frac{100\% - 0 - (10\% - 50\%)}{10} = 14\%$$

Using a depreciation rate of 14 percent for 10 years would yield a recovery of 140 percent of the cost of the asset over its expected life. As a result, the asset would have a negative asset value by the eighth year, i.e., accumulated depreciation would exceed the asset's cost.

⁵² The carrying charge factors are administrative, maintenance, and depreciation expenses, taxes, and rate of return. The carrying charge formula computes percentages for each factor which are added and then multiplied against the net asset value of poles also referred to as net pole investment. For example, if the carrying charge formula yields 10% for each factor, the carrying charge rate would be 50%. This rate would then be multiplied by net pole investment (expressed on a per pole basis as net cost of a bare pole) and the percentage of usable pole space occupied by a cable operator's equipment to determine the maximum just and reasonable rate per pole.

⁵³ See Whitepaper filed by the law firm of McDermott, Will and Emery on August 28, 1996. The Whitepaper was filed on behalf of the American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power and Light Company, Northern States Power Company, The Southern Company and Washington Water Power Company. The Whitepaper is available in the Commission's public reference room under the docket in this proceeding.

pole height has increased to an average of 40 feet. At the same time, the Whitepaper contends that the usable space presumption should also be changed from 13.5 feet to 11 feet.⁵⁴ Thus, we seek comment as to whether our current pole height and usable space presumptions are still applicable or whether these presumptions should be modified. The Whitepaper also makes certain recommendations with respect to accounts which should be included in the net cost of a bare pole. These accounts include costs for lightning arresters and grounding installations. We agree that such equipment installed to protect poles are included in the calculation of the net cost of a bare pole. We believe however, that current calculations already include all such lightning protectors and ground installations.⁵⁵

19. The Commission has always recognized the NESC requirement that a 40 inch safety space must exist between electric lines and communication lines.⁵⁶ The NESC requires a 40 inch safety space to minimize the possibility of physical contact by employees working on cable television or telecommunications attachments with the potentially lethal electric power lines.⁵⁷ We seek comment on the premise that the safety space emanates from a utility's requirement to comply with the NESC and should properly be assigned to the utility as part of its usable space.

20. Poles of 30 feet or less are currently included in the calculation of cost of bare pole. The Whitepaper contends that poles of 30 feet or less lack a sufficient amount of usable space to accommodate multiple attachments.⁵⁸ In most cases these smaller poles have only electrical and/or telephone attachments affixed to them. We seek comment on whether including these smaller poles in the numerator and denominator of the cost of bare pole calculation results in a distorted determination of the actual costs of a bare pole. We also seek comment on this proposal and whether poles of 30 feet or less lack a sufficient amount of usable space to accommodate multiple attachments.

⁵⁴ *Id.* at 11.

⁵⁵ *Id.* The electric utility companies contend that portions of Account 365 (Overhead conductors and devices) and Account 368 (Line transformers) should be included in the calculation of the net cost of a bare pole. We believe such costs are already part of the current formula. First, pole investment is included in Account 364 (Poles, towers and fixtures), Account 365 (Overhead conductors and devices) and Account 369 (Services). Application of the .85 factor eliminates the non-pole investment in these accounts, leaving in the valuation all pole-related investment including lightning protectors and grounding installations. Second, we do not believe the equipment in Account 368 (Line transformers) is pole-related. Rather, it is installed to protect equipment used to transform electricity to the voltage usable by customers. Thus, lightning protectors and grounding installations recorded in this account should not be included in the calculation of the net cost of a bare pole.

⁵⁶ See *Second Report and Order*, 72 FCC 2d at 69-70; *Third Report and Order*, 77 FCC 2d at 190; *Usable Space Order*, slip op. at para. 7.

⁵⁷ *Second Report and Order*, 72 FCC 2d at 69-70.

⁵⁸ See *supra* Whitepaper at note 53.

21. With regard to SWB's petition, we seek comment on the scope of the problem. For instance, we seek comment on the number of jurisdictions where accumulated depreciation balances currently exceed the gross pole investment. We also seek comment on the number of jurisdictions in which accumulated depreciation balances will exceed gross pole investment in the near future. We seek comment on the rates being charged in such jurisdictions and how such rates comport with the statutory maximum rate.

22. If commenters believe that a modification of the pole attachment formula is necessary, we seek comment on appropriate adjustments and the circumstances in which the adjustment should be made. In the alternative, if commenters believe that the frequency with which this problem occurs does not warrant any adjustment to the formulas, we seek comment on whether a case-by-case approach should be used.

23. We recognize that many of the expenses associated with the ownership of poles continue after full recovery of investment in poles takes place. The inclusion of the cost of removal in the calculation of depreciation for poles, however, tends to relieve attaching parties of this burden as full recovery of the poles investment takes place over time.⁵⁹ One possible modification that would eliminate this effect would be to adjust the current net investment approach. The adjustment would eliminate the net salvage amount from the accumulated depreciation balance when the net value of poles becomes negative.⁶⁰ Removal of the net salvage amount would, for the purpose of pole attachment rate calculation, restate the accumulated depreciation account to reflect only the depreciation of the pole investment, restoring the net pole investment to a positive balance. Calculating the appropriate amounts to recognize the continuing cost of pole ownership could be done as currently provided in the formula. We seek comment on whether the application of the appropriate factors to the net pole amount, adjusted as proposed, would provide a fair rate for sharing in the recovery of continuing expenses associated with pole ownership.

24. Pending comment, we anticipate the need for this proposed adjustment will be limited to circumstances such as those suggested by SWB. We believe that the adjustment may properly be applied only after the net asset balance for poles has become negative. Each time a new rate is to be developed, the poles account would be examined before the accumulated

⁵⁹ When net salvage is factored into depreciation rates as a negative amount, the net asset value to which the cost factors are applied in the formula may become inordinately low. This may result in some degree of under recovery. Such occurrences however, tend to be balanced by over recovery in the early phase of the pole's life. When the net pole investment eventually becomes negative, certain cost factors of the Carrying Charge Rate of the fee formula become negative while others remain positive. As a result they offset one another. The resulting Carrying Charge Rate is applied to a negative balance that represents some portion of the cost of removal and not the remaining investment in poles.

⁶⁰ SWB Petition at 3. See also para. 15 *supra* (explaining net salvage amount).

depreciation balance is adjusted. If there is a positive balance, no adjustment to the accumulated depreciation account would be made.⁶¹

25. We recognize that this proposed method of making an adjustment only after the account balance becomes negative will result in a gradually declining rate that will eventually rise to a more consistent level over time after the proposed adjustment is made. Thus, even before the pole account becomes negative, the inclusion of the disposal cost in depreciation could have the tendency to render pole attachment rates inordinately low. We believe however, that this is balanced by over recovery in the early phase of the pole's life. A new pole, for instance, should have very little maintenance requirements. Yet, in the early phase of its life, the full, undepreciated cost is included in the formula. Consequently, an excess provision for maintenance is included in the rate for the new pole. Normally, within the full complement of poles, there should be a natural balancing of old and new poles. This results in an average condition that affects inclusion of the appropriate maintenance component in the formula. It appears that such balancing may not occur when the cost of disposal works to reduce account balance for poles in the manner under consideration. Nevertheless, we believe it to be appropriate to require that the account be left unadjusted until full recovery has occurred. This is necessary to balance over the life of every pole the excessive amounts included when the poles were new. We invite comment on this method and on whether it appropriately provides for such balancing and then allows the rate to be stabilized at a level more reflective of the normal condition that prevails for the majority of operators not faced with such unusual disposal costs.

26. The administrative expense, maintenance expense, depreciation expense, and at least some of the tax expenses associated with pole ownership are all expected to continue after full recovery of the pole investment has occurred. Consequently, the calculation of the appropriate factors for these components of the rate formula should be made using the pole investment balance after adjustment has been made to the accumulated depreciation for poles. We do not, however, propose to make any adjustments in the calculation of the return element of the pole attachment rate formula. Since the full cost of poles will have been recovered at such time that the net balance for poles becomes negative, we do not believe that it would be appropriate to continue to provide pole owners with a return on their investment in poles. We propose, therefore, that the calculation of the return element should be made separately in the manner currently prescribed. Thus, the return element would be computed on the basis of the unadjusted net pole balance and the result added (as a negative amount) to the carrying charges for administrative, maintenance, depreciation, and tax expenses. We believe that the inclusion of this negative return element is reasonable and appropriate because the utility has, in effect,

⁶¹ We believe that the proposed adjustment to accumulated depreciation for poles should be limited, since there is no record that rates generally need adjustment and general applicability of the proposed adjustment may tend to increase such pole attachment rates. This would allow for the continued recovery of those expenses that continue even after full recovery of investment occurs. As proposed, the exception would be triggered only when the net pole investment becomes negative due to the inclusion of the cost of removal in the depreciation account. As stated, in note 59 *supra*, we believe that there is a certain desired balancing of over and under recovery that takes place by allowing the adjustment to be made only after the net pole investment becomes negative.

already recovered more than the original cost of its pole plant through depreciation charges. While this "over-recovery" is necessary to defray the costs of disposing of the poles when they are retired from service, the utility has the use of any over-recovered amounts until the disposal of the poles actually takes place. Our tentative conclusion is that a utility's pole attachment rates should reflect over-recovery in the form of a negative return carrying charge. We seek comment on this tentative conclusion.

27. Moreover, we tentatively conclude that the tax element of the rate formula should also be adjusted in those instances where the proposed adjustment to the accumulated depreciation account is made. The current formula includes a rate element for taxes in the Carrying Charge Rate. This includes federal and state income taxes as well as other operating taxes. A provision for income taxes is included in association with the provision for the cost of capital because the cost of capital is usually calculated as a return on investment, which includes an equity portion. The equity portion is considered profit, and as such, is taxable as income. Consequently, there usually arises an additional expense associated with the pole ownership, income tax expense, which is appropriately included in the calculation of the pole attachment charge. Our proposed adjustment to the formula, however, does not include the usual provision for the cost of capital, but rather an adjustment for the "over-recovery" pending disposal of the poles. Thus, under the proposed adjustment, there would be no return on equity included in the formula, and consequently there would be no associated income tax expense. Therefore, we tentatively conclude that the inclusion of federal and state income taxes in the formula should be discontinued when the proposed adjustment is made to the depreciation account. We seek comment on this proposal to include only operating taxes, other than income taxes, in the rate formula.

28. In proposing the use of this adjustment methodology, we are concerned that because telephone and electric utilities install poles over time at various original costs and because net salvage estimates vary over time, the extraction of the net salvage effect from accumulated depreciation could prove to be difficult. In addition, current FCC and Federal Energy Regulatory Commission accounting reports do not provide information with respect to the net salvage effect. We seek comment on the feasibility of this methodology as proposed. Additionally, we seek comment on the effectiveness of the methodology for the development of fair pole attachment rates and on proposed modifications necessary to make this methodology effective in attaining this objective. Finally, commenters are requested to provide detailed assessments of the effects of this methodology on attachment rates.

29. Alternatively, we seek comment on calculating pole attachment rates using gross book costs instead of net book costs.⁶² Under this approach the cost of a bare pole and most

⁶² Gross book cost is the original cost of the poles. Net book cost is the original cost of the poles less accumulated depreciation.

carrying charges are computed using gross book costs.⁶³ Prior to the *Pole Attachment Order*, the Commission had decided certain cases using gross book costs to calculate maximum reasonable pole attachment rates.⁶⁴ The Commission also has stated that if both parties to a pole attachment complaint agree, the pole attachment rates may be computed using gross book costs.⁶⁵ The use of gross book costs appears consistent with the legislative history supporting Section 224, which indicates that the Commission has significant discretion in selecting a methodology for determining just and reasonable pole attachment rates.⁶⁶ We seek comment on this alternative to ensure a complete record on possible changes to the current formula. We note that because of the way administrative costs are allocated, the application of gross book costs may produce a slightly higher rate. We seek comment on whether this assumption is true and if so what the impact of this change would be.

2. Other Proposed Formula Adjustments

30. When we adopted the revised pole attachment formula in 1987, the Uniform System of Accounts for telephone companies was prescribed by our then existing Part 31 rules.⁶⁷ The formula specifies particular Part 31 accounts used to calculate the pole attachment rates telephone companies may charge cable systems or telecommunications carriers.⁶⁸ In 1988, Part 31 was replaced by Part 32, which changed how telephone companies account for certain costs.⁶⁹ We propose to revise our pole attachment formula for telephone companies so that it accurately

⁶³ The rate of return and the income tax carrying charges must continue to be computed using net book costs because utility prices are generally set to allow them to earn an authorized rate of return on their net book costs. We currently compute the carrying charge elements for maintenance, depreciation and administrative expenses, as well as for return on investment and taxes, using net book costs. Under the proposed alternative, the carrying charge elements for maintenance, depreciation and administrative expenses would be calculated using gross book costs for both total plant investment and pole investment. For example, the administrative expense element is currently calculated by dividing total administrative and general expenses by net book cost. This yields a percentage that is applied to the net book cost of a bare pole. In contrast, a gross book cost approach to allocation would divide total administrative and general expenses by gross book costs. The resulting percentage would then be applied to the gross book cost of the bare pole.

⁶⁴ See, e.g., *Capital Cities Cable, Inc. v. Southwestern Public Service Co.*, Mimeo No. 5431 (June 28, 1985); *Booth American Co. v. Duke Power Co.*, Mimeo 3064 (Com. Car. Bur., Mar. 22, 1984); *Teleprompter of Greenwood, Inc. v. Duke Power Co.*, Mimeo 001866 (Com. Car. Bur., July 6, 1981).

⁶⁵ *TeleCable of Piedmont, Inc. et al. v. Duke Power Company*, Hearing Designation Order, DA 95-1362, (Com. Car. Bur., June 15, 1995).

⁶⁶ 1977 Senate Report at 9.

⁶⁷ 47 C.F.R. Part 31 (1987).

⁶⁸ *Pole Attachment Order*, 2 FCC Rcd at 4402, Appendix A.

⁶⁹ 47 C.F.R. Part 32.

reflects our existing Part 32 Uniform System of Accounts.⁷⁰ We also propose to amend the formula to improve its accuracy. For example, certain expenses previously included in the formula as administrative expenses are not usually considered to be administrative in nature. Consequently it appears that the Part 31 mapping to the formula included non-administrative expenses in the administrative component of the Carrying Charge Rate. Considering this, our proposed Part 32 mapping to the formula will not include such non-administrative expense in the administrative component of the Carrying Charge Rate. Appendix B outlines our proposed Part 32 mapping to the formula and indicates the changes we propose to improve its accuracy. We seek comment on these proposals.

a. Administrative Component

31. We propose to include amounts recorded in the following Part 32 accounts in the administrative component formula because they are all non-project specific expenses of an administrative and general nature: Account 6720, General and administrative; Account 6710, Executive and planning; Account 6110, Network support expense; Account 6120, General support expenses; Account 6534, Plant operations administration expense; and Account 6535, Engineering expense. Appendix B maps the transition from Part 31 to Part 32, subject to several proposed changes discussed herein.

32. To further improve the accuracy of the administrative component of the formula, we propose to exclude earth station expenses recorded in Account 6231, Radio systems expense, from administrative expense calculations. We believe that because earth station expenses are not properly categorized as administrative and general expenses, they should not be included in the administrative component formula. Under Part 31, the administrative component calculations also included all amounts recorded in Accounts 671, Operating rents; 672, Relief and pensions; and 677, Expenses charged during construction. Some of these amounts are now recorded in non-administrative accounts. We propose to exclude those amounts recorded in non-administrative accounts from our administrative component calculations.

33. Under Part 31, telephone company expenses for rental of poles from other entities was included in Account 671, Operating rents. As discussed in the previous paragraph, we are proposing to exclude the non-administrative amounts previously included in Account 671 from the administrative component of the pole attachment Carrying Charge Rate in the pole attachment formula. Under Part 32 however, the expense for rental of poles by telephone companies is now included in Account 6411, Poles expense. Accordingly, it is now subject to inclusion in the Carrying Charge Rate as part of the maintenance component. The rents in question, however, are generally paid by telephone companies to utilities in order to secure rights to attach

⁷⁰ We note that the Common Carrier Bureau has in the past provided guidance to telephone companies and cable systems on applying the formula using Part 32 accounts. Letter from Kenneth P. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau, to Paul Glist, Esq., Cole, Raywid & Braverman, 5 FCC Rcd 3898 (Com. Car. Bur., June 22, 1990).

telecommunications lines to the utility's poles. We do not believe, therefore, that the expense incurred by telephone companies for the rental of poles from other entities is related to the poles, or to the maintenance of poles, which attaching entities rent from other telephone companies. Furthermore, to include these rents in pole attachment rate computations could result in double payments by attaching entities -- once when the attaching entity attaches to a utility's poles and again when the attaching entity pays an attachment fee to a telephone company renting poles from the same utility. Thus for the purpose of computing pole attachment rates, we propose to include an adjustment to the amount in Account 6411 to eliminate the expense associated with the rental of poles from other entities. We seek comment regarding this tentative proposal.

b. Maintenance Component

34. The Commission has traditionally included Account 602:1, Repairs of pole lines, in the maintenance component formula. That account consisted primarily of labor-related expenses; it did not, however, include the benefits associated with those salaries and wages. Under Part 32, Account 6411, Poles expense, includes both salaries and wages and associated benefits. Because these benefits relate to pole maintenance activities, we propose to incorporate them in the maintenance component formula. Previously these expenses were included in the administrative expense component formula. We seek comment to our tentative proposal not to include pole rents recorded in Account 6411 in the maintenance component formula, for the above stated reasons.⁷¹

35. Electric utilities record the cost of labor and expenses incurred in the general supervision and direction of the distribution system maintenance in Account 590, Maintenance supervision and engineering. We believe that a portion of the amount in this account supports the pole line investment as well as the conduit investment and should be included in the calculation of the maintenance carrying charge. The amount in this account, however, applies to distribution plant other than poles and conduit and must therefore be allocated appropriately. We seek comment on our tentative conclusion to include a portion of the expenses recorded in Account 590 in the maintenance carrying charge element and on the manner of allocating the appropriate amounts to the pole maintenance carrying charge and to the conduit carrying charge.

c. Taxes Component

36. We also propose that the taxes component formula reflect the change from Part 31 to Part 32 accounting. Under Part 31, that formula included a series of tax-related accounts. We seek comment to our tentative proposal to include in the taxes component all of the comparable Part 32 accounts. Appendix B lists these accounts.

⁷¹ See *supra*, para 33.

3. Rate of Return

37. As discussed above, our pole attachment formula allows utilities to include a return on pole-related investment in pole attachment rates charged to telecommunications carriers. To simplify pole attachment rate proceedings, we currently use the rate of return authorized for the utilities' intrastate services.⁷² This policy implicitly assumes that the states will continue to regulate utility rates on a rate of return basis. Many states, however, have adopted forms of incentive-based regulation for some utilities that do not rely on an authorized rate of return. In these cases, we believe that the most recent, authorized intrastate rates of return may not reflect the utilities' costs of capital. We therefore invite comment on what rate of return we should use to calculate maximum pole attachment rates for utilities operating in states that no longer regulate on a rate of return basis. We note that the Commission has adopted a rate of return for telephone companies of 11.25% in the *Accounting Safeguards under the Telecommunications Act of 1996* proceeding.⁷³ We invite comment on whether this same rate should be applied uniformly in all states which no longer specify a rate of return.

IV. CONDUIT ATTACHMENT ISSUES

A. Application of the Pole Attachment Formula to Conduits

38. The Commission's rules, as applied to conduits, provides the following maximum reasonable rate under Section 224:⁷⁴

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV} \times (\text{Operating Expenses} + \text{Capital Cost of Conduit})}{\text{Total Usable Space}}$$

39. In the pole attachment context, as noted above, we generally calculate the sum of operating expenses and capital cost by multiplying the net cost of a bare pole times the carrying charges.⁷⁵ In the conduit context, we multiply the net linear cost of the conduit (instead of the net cost of a bare pole) by the carrying charges, so that the formula defining the maximum reasonable rate becomes:

⁷² See 47 C.F.R. § 1.1404(g)(10). See also *Alabama Power*, 773 F.2d at 371-72.

⁷³ 11 FCC Rcd 17539, par. 166 (1996).

⁷⁴ See 47 C.F.R. § 1.1409(c). See also *Pole Attachment Order*, 2 FCC Rcd 4387, 4388, ¶6.

⁷⁵ 47 C.F.R. § 1.1409(c). Carrying charges refer to costs incurred by the utility in owning and maintaining conduit regardless of the presence of cable attachments. See 47 C.F.R. § 1.1404(g)(9). They include the utility's income tax, conduit maintenance, administrative, and depreciation expenses, as well as a return on conduit-related investment at the authorized intrastate rate of return. We express the carrying charges as a percentage that we calculate using a formula. See *Pole Attachment Order*, 2 FCC Rcd at 4388, 4391.

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Net Conduit Cost per meter}^{76} \times \text{Carrying Charges}$$

40. The conduit attachment formula is provided in Appendix C to this Notice.⁷⁷ Under the conduit attachment formula for telephone companies, the conduit maintenance carrying charge calculation is based on the asset Account 2441 (Conduit systems) and the expense Account 6441 (Conduit systems expense). The formula for depreciation and rate of return are based on Account 2441. The carrying charge percentage calculations for administrative and tax expense are the same for poles and conduit because they are based on total plant investment, instead of poles or conduit investment.

41. For electrical utilities, we believe that the formula for conduit investment is included in Account 366 (Underground conduit), Account 367 (Underground conductors and devices), and Account 369 (Services). We seek comment on whether these are the appropriate accounts. The related expenses for maintenance of this investment are included in Account 594 (Maintenance of underground lines). Thus, under the proposed conduit attachment formula for electric utilities, the conduit maintenance carrying charge percentage calculation is based on asset Accounts 366, 367, and 369, and the expense Account 594, and the formula for depreciation and rate of return are based on Accounts 366, 367, and 369. As proposed for the telephone company calculations, the method for calculating the carrying charge percentage for administrative and tax expense are the same for poles and conduit because they are based on total plant investment, instead of poles or conduit investment.

42. As we noted, when computing the cost of a bare pole, we must multiply a factor 0.85 for electric utilities or 0.95 for telephone companies⁷⁸ by the net asset value of poles to eliminate investment that is included in the pole investment balance but which supports the pole owners operations exclusively.⁷⁹ For telephone company conduit, we believe there is no such comparable non-cable related investment in Account 2441 that supports telephone company operations exclusively; thus, the computation of telephone company net conduit does not reflect an adjustment factor for such non-conduit investment. We seek comment on this tentative conclusion. For electric companies, however, the investment in Account 369, as well as in Account 367, if included in the conduit investment computation, includes non-conduit investment and should be eliminated. Thus, an adjustment factor must be applied in the electric company formula. We seek comment on this perspective. Respondents are encouraged to provide

⁷⁶ We note, that conduit length can also be expressed in feet.

⁷⁷ See 18 C.F.R. Part 101 (stating the accounts associated with the conduit attachment formula for electric utilities). See also 47 C.F.R. Part 32 (stating the accounts associated with the conduit attachment formula for telephone companies).

⁷⁸ See *supra* para. 10.

⁷⁹ 47 C.F. R. § 1.1409(c).

estimates of the adjustment factor to be applied based on the conduit-related investment to the total investment in the accounts that include conduit-related investment. Respondents should describe the source of the data used, the method employed and the calculations made in arriving at their estimates.⁸⁰ The net conduit cost per meter must include this factor, if one applies, as follows:

$$\text{Net Conduit Cost per meter} = \frac{\text{Net Conduit Investment} \times \text{Factor}}{\text{Length (Meters)}}^{81}$$

B. Proposed Conduit Methodology

43. We seek comment on the differences between conduit owned and or used by cable operators and telecommunications carriers and conduit owned and or used by electric or other utilities. We understand that there are inherent differences in the safety aspects of the latter conduits and ducts, and we seek comment on physical limitations that would affect the rate for such facilities. Where such conduit is shared, we seek information on the mechanism for establishing a just and reasonable rate. We seek comment on the distribution of usable and unusable space within the conduit or duct and how the determination for such space is made. In this *Notice* we are not addressing the access or safety provisions, as those issues are more appropriately addressed in the context of the *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*.⁸² Rather, we are interested in the application of our formula for the purpose of setting just and reasonable rates. Our present formula does not appear to take such differences into consideration, and our experience in resolving disputes relating to electric or other utility conduit has been limited.

44. Section 224 provides that total conduit space and conduit space occupied by cable systems is based on duct or conduit capacity.⁸³ In addition, Section 224 states that "a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way."⁸⁴ The usable space can be

⁸⁰ Based on the responses to the request for comment on the non-conduit adjustment factor, we will determine whether a study and/or survey will be required for the purpose of determining a factor.

⁸¹ Net Conduit Investment equals Gross Conduit Investment less its associated accumulated depreciation and deferred income taxes.

⁸² 11 FCC Rcd 15499, par. 1119-1248.

⁸³ A conduit is a tube that contains many ducts each of which may hold more than one single electric, telephone or cable wire.

⁸⁴ 47 U.S.C. § 224(d)(1).

estimated based on the number of ducts or portion of a duct that an attachment occupies. We tentatively conclude that measuring the actual portion of duct space occupied by an attachment could be difficult and lead to further disputes between the parties. We seek comment on this tentative conclusion. Instead of attempting to measure the actual duct space occupied, we propose to adopt a new conduit methodology patterned after the half-duct methodology used by the Massachusetts Department of Public Utilities.⁸⁵ In order to apply the half-duct formula, a determination of the cost per foot of one duct must be made, and then divided by one-half to produce a "half-duct convention." In the *Greater Media* decision, the Massachusetts Department of Public Utilities ("MDPU") found that a half-duct methodology was a reasonable approach to establish a conduit attachment rate for the complainant cable operator. The MDPU held that since the space occupied by the cable operator required the use of only one half-duct, and that its use did not preclude the use of the other half of the duct, the cable operator should only be charged for a half-duct. Moreover, the MDPU found that unless a cable operator's conduit precludes use by other conduit attachers, the cable operator should pay only for a half-duct.

45. This methodology determines the maximum just and reasonable rate per attachment, per duct foot that can be charged. The proposed formula is represented as follows:⁸⁶

$$\text{Maximum Rate} = \frac{1 \text{ Duct}}{\text{Avg. \# of Ducts} - \text{Adjustments for reserved ducts}} \times \frac{1}{2} \times \text{Net Linear Cost of Conduit} \times \text{Carrying Charges}$$

We refer to the first fraction in the above formula as the "occupied space component" of the conduit attachment formula. If a utility reserves one duct for maintenance, and if the attacher has the right to utilize that reserved space in the event of a cable break or benefits in any way from the reservation of that space, that reserved duct would be considered unusable space. In that event, it is necessary to include an "adjustment for reserved ducts" element in the formula to reduce the average number of ducts in the denominator of the occupied space component of the formula. The adjustment for reserved ducts element would be the number of reserved ducts that all attachers have the right to use in the event of a cable break or that they otherwise receive benefit from in any other way. If the attacher has no right to use that space or receives no benefit from that duct, we propose that the denominator should not be reduced.

⁸⁵ The Commonwealth of Massachusetts has the authority to regulate the rates, terms, and conditions for pole attachments under Section 224 of the Communications Act of 1934, as amended. See 47 U.S.C. § 224(c)(1). We note that the Massachusetts pole attachment regulations are similar to Section 224. See also *Multimedia Cablevision, Inc. v. Southwestern Bell Telephone*, CS Docket No. 96-181, FCC 96-362 (September 3, 1996); see also *Greater Media, Inc. v. New England Telephone and Telegraph*, Massachusetts D.P.U. 91-218 (1992).

⁸⁶ The proposed formula is attached to this Notice as Appendix C.

46. We seek comment on our proposed rebuttable presumption that a cable attacher occupies a half-duct of space in order to factor a reasonable conduit attachment rate. We tentatively conclude that the half-duct methodology is the simplest and most reasonable approximation of the actual space occupied by an attacher. In addition, we tentatively believe that the half-duct methodology is the most straight forward approach to calculating a conduit attachment fee because it does not require the parties to prove the actual amount of the duct the attachment occupies. We solicit comment on these tentative conclusions. We also seek comment on any additional proposals that would provide a simple and administratively efficient conduit methodology.

V. Other Matters

47. We recognize that the issues raised in this *Notice* are broad in scope, and there may be additional issues we have not specifically addressed in the *Notice*. Commenters may submit proposals regarding the implementation of these pole attachment reforms. We welcome these comments and also seek proposals to ease the burdens of regulation for all interested parties.

48. Section 257 of the Act provides for the elimination of "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services."⁸⁷ We believe that market entry barriers are minimized for small cable operators and telecommunications carriers by the application of Section 224 which requires just, reasonable and nondiscriminatory rates.

VI. INITIAL REGULATORY FLEXIBILITY ACT ANALYSES

49. As required by Section 603 of the Regulatory Flexibility Act (RFA),⁸⁸ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in this *Notice*. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

50. *Need for Action and Objectives of the Proposed Rule.* In 1987, the Commission adopted its current pole attachment formula for calculating the maximum just and reasonable rates utilities may charge cable systems for pole attachments. In this *Notice*, we seek comment as to whether the current pole attachment formula should be modified or adjusted to eliminate certain anomalies and rate instabilities particular parties assert have occurred. We have also tentatively

⁸⁷ 47 U.S.C. § 257(a).

⁸⁸ 5 U.S.C. § 603.

proposed such possible modifications to the formula, should altering the formula become necessary, that would improve the accuracy of the formula. In addition, we propose changes to the formula to reflect the present Part 32 accounting system that replaced the former Part 31 rules in 1988. Finally, we propose a new conduit methodology that will determine the maximum just and reasonable rates utilities may charge cable systems and telecommunications carriers for their attachments to conduit systems.

51. *Legal Basis.* The authority for the action as proposed for this rulemaking is contained in Sections 1, 4(i), 4(j), 224, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 224, 303 and 403.

52. *Description and Estimate of the Number of Small Entities Impacted.* For the purposes of this Notice, the RFA defines a "small business" to be the same as a small business concern under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.⁸⁹ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁹⁰ The SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, except Radiotelephone) to be a small entity when it has fewer than 1500 employees.⁹¹

A. Utilities

53. *Total Number of Utilities Affected.* The decisions and rules adopted herein may have a significant effect on a substantial number of utility companies. Section 224 of the Statute defines a "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." The SBA has provided the Commission with a list of utility firms which may be effected by this rulemaking. Based upon the SBA's list, the Commission seeks comment as to whether all of the following utility firms are relevant to Section 224.

1. Electric Utilities (SIC 4911, 4931 & 4939)

54. *Electric Services.* The SBA has developed a definition for small electric utility firms. The Census Bureau reports that a total of 1,379 electric utilities were in operation for at

⁸⁹ 5 U.S.C. § 601(3)(incorporating by reference the definitions of "small business concern" in 5 U.S.C. § 632).

⁹⁰ 15 U.S.C. § 632. See e.g., *Brown Transport Truckload Line v. Southern Wipers Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

⁹¹ 13 C.F.R. § 121.201.

least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 447 of the 1,379 firms listed had total revenues below five million dollars. *Electric and Other Services Combined*. The SBA has classified this entity as a utility whose business is primarily electric, less than 95%, in combination with some other type of service. The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars. *Combination Utilities, Not Elsewhere Classified*. The SBA defines this utility as providing a combination of electric, gas, and other services which are not otherwise classified. The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars.

2. Gas Production and Distribution (SIC 4922, 4923, 4924, 4925 & 4932)

55. *Natural Gas Transmission*. The SBA's definition of a small natural gas transmitter is an entity who is engaged in the transmission and storage of natural gas. The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars. *Natural Gas Transmission and Distribution*. The SBA has classified this entity as a utility who transmits and distributes natural gas for sale. The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributor is a firm whose gross revenues did not exceed five million dollars. The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars. *Natural Gas Distribution*. The SBA defines a natural gas distributor as an entity that distributes natural gas for sale. The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars. *Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution*. The SBA has classified this entity as a utility who engages in the manufacturing and/or distribution of the sale of gas. These mixtures may include natural gas. The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars. *Gas and Other Services Combined*. The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services. The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas

and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 24 of the 43 firms listed had total revenues below five million dollars.

3. Water Supply (SIC 4941)

56. *Water Supply.* The SBA defines a water utility as a firm who distributes and sells water for domestic, commercial and industrial use. The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 3,065 of the 3,169 firms listed had total revenues below five million dollars.

4. Sanitary Systems (SIC 4952, 4953 & 4959)

57. *Sewerage Systems.* The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems. The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars. The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars. *Refuse Systems.* The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse "by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials." The Census Bureau reports that a total of 2,287 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues did not exceed six million dollars. The Census Bureau reported that 1,908 of the 2,287 firms listed had total revenues below six million dollars. *Sanitary Services, Not Elsewhere Classified.* The SBA defines these firms as engaged in sanitary services. The Census Bureau reports that a total of 1,214 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firms gross revenues did not exceed five million dollars. The Census Bureau reported that 1,173 of the 1,214 firms listed had total revenues below five million dollars.

5. Steam and Air Conditioning Supply (SIC 4961)

58. *Steam and Air Conditioning Supply.* The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air. The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues did not exceed nine million dollars. The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars.